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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CARLOS DANIEL ARMIJO, Defendant and Appellant.	D074699 (Super. Ct. No. FVI1502517)

APPEAL from a judgment of the Superior Court of San Bernardino County, Eric M. Nakata, Judge. Affirmed in part; reversed in part; remanded with directions.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael P. Pulos and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

A jury found Carlos Daniel Armijo guilty of first degree residential burglary (Pen. Code, § 459)[1] (count 1). In a bifurcated trial, the trial court found that Armijo had suffered five prison priors (§ 667.5, subd. (b)) and two strike priors (§ 1170.12, subds. (b)–(i)).

Armijo filed a motion to strike one of the strike priors. The trial court denied the motion and sentenced Armijo to an aggregate sentence of 30 years to life in prison, consisting of a sentence of 25 years to life on count 1 pursuant to the Three Strikes law (§ 1170.12, subds. (b)–(i)) and five consecutive one-year terms for each of the prison priors (§ 667.5, subd. (b)). At sentencing, the court imposed a $40 court operations assessment (§ 1465.8) and a $30 criminal conviction assessment (Gov. Code, § 70373). The court also imposed a $1,000 restitution fine (§ 1202.4, subd. (b)) and imposed but stayed a corresponding $1,000 parole revocation restitution fine, pending Armijo's successful completion of parole.

On appeal, Armijo claims that the trial court erred in failing to instruct the jury on the lesser related offense of receiving stolen property. Armijo also maintains that the court erred in instructing the jury pursuant to CALCRIM No. 371 concerning the fabrication of evidence, arguing that the instruction permitted the jury to draw the purportedly irrational permissive inference that a person who fabricates evidence may be

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1 All subsequent statutory references are to the Penal Code, unless otherwise specified.

aware of his guilt. Armijo further contends that the trial court abused its discretion in denying his motion to strike one of his strike priors. He also argues that the judgment must be reversed because his sentence of 30 years to life constitutes a cruel and/or unusual punishment. We reject each of these arguments. Armijo also maintains that the trial court erred in the manner by which it calculated his presentence conduct credits. The People concede this error and we accept the People's concession.

Finally, in a supplemental brief, citing the recent decision in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), Armijo contends that the trial court erred in imposing the court operations and conviction assessments without first determining his ability to pay these charges. Armijo also contends that this court should remand the matter to the trial court with directions to stay the execution of the restitution fine (§ 1202.4, subd. (b)) unless the People establish his ability to pay this fine. In response to Armijo's contentions raised in his supplemental brief, the People argue that "if a remanded hearing is required, [Armijo] should prove his inability to pay." We conclude that due process prohibits a trial court from imposing court operations assessments, criminal conviction assessments, or restitution fines where the defendant proves his inability to pay such charges. We further conclude that a remand is warranted in this case to permit Armijo to attempt to demonstrate that he is unable to pay the assessments and fines that the trial court imposed.

Accordingly, we reverse the trial court's presentence conduct credit determination and its imposition of the court operations assessment, criminal conviction assessment, and restitution fines. We remand the matter to the trial court with directions to recalculate Armijo's presentence conduct credits, and to permit Armijo to attempt to demonstrate that he lacks the ability to pay the court operations assessment, criminal conviction assessment, and restitution fines. In all other respects, we affirm the judgment.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The burglary*

On October 9, 2015, victim K.C. left her home for a weekend trip. When she returned from the trip on October 12, she found that someone had thrown a rock into her kitchen, smashing the glass in her back door. Some of the rooms in her home had been ransacked, and several items, including various electronics and pieces of jewelry, were missing. K.C. called the police, who came to her house that same day.

An officer noticed that there were "dig marks" outside the back door of K.C.'s house. The marks appeared to have been made by wheels, and there were shoe impressions next to the marks, which created a trail. The trail led from the victim's house to the front doorstep of the house of Armijo's friend, Shirley R. (Shirley).

After following the trail to Shirley's house, a police officer knocked on the door, and Shirley answered. The officer explained that he was investigating a burglary and

asked Shirley whether anybody else was inside her house. Shirley responded affirmatively and let the officer into the house. The officer found Armijo lying on a couch in the living room.

With Shirley's consent, the officer searched the home. During the search, the officer found several of the victim's missing items, as well as a backpack with wheels. The wheels on the backpack appeared to have been those that made the tread marks leading from the victim's home to K.C.'s home. The officer also determined that Armijo's shoes contained treads that matched the shoe impressions on the trail.

B. *Shirley's testimony*

Shirley testified that she was Armijo's former girlfriend. Although the two were no longer in a relationship, Shirley periodically allowed Armijo to spend the night in her home, including on the evening of October 11. When Armijo arrived at Shirley's home that night, he was carrying a backpack.

C. *Jail call evidence*

Shortly before trial, Armijo called Shirley from jail. During the call, in discussing Shirley's potential testimony at the trial in this case, Shirley told Armijo, "And I already told you, you know um, I assumed that you were dumpster diving and that's where that came from as far as I'm concerned."

Armijo responded, "Ok, ok, just you don't remember nothing and that's the best answer and they can't force you to remember."

III.

DISCUSSION

A. *The trial court did not err in failing to instruct the jury on the lesser related offense of receiving stolen property*

Armijo claims that the trial court erred in failing to instruct the jury on the lesser related offense of receiving stolen property. Armijo contends that such an instruction was required as a component of his federal constitutional right to present a defense to the charged offense of residential burglary. Armijo's claim raises a question of law, to which we apply the de novo standard of review. (See *People v. Guiuan* (1998) 18 Cal.4th 558, 569–570.)

1. *Procedural background*

During a conference on jury instructions, defense counsel stated the following:

> "I would make invitation to the District Attorney, to add a lesser-related offense to receiving stolen property [*sic*]. I have researched the issue . . . , and I do understand that I think under the elements test that receiving stolen property has not been held to be a lesser-included offense and not something that sua sponte should be given when there's a burglary charge.
>
> "However, the [D]istrict [A]ttorney does have the authority to allow by way of agreement. In this case, I think there is sufficient facts to underwrite at least such a lesser-related offense [*sic*] assuming that the [D]istrict [A]ttorney agrees to cooperate."

The prosecutor indicated that he would not agree to the court giving the instruction, but stated that he would not object if defense counsel were to argue that Armijo was guilty of no more than receiving stolen property.

The trial court did not instruct the jury on the crime of receiving stolen property.

2. *Governing law*

"[R]eceiving stolen property is a lesser related offense of . . . residential burglary." (*People v. Lagunas* (1994) 8 Cal.4th 1030, 1035.)

The California Supreme Court has clearly and unequivocally held "that trial courts should deny a defense request for instructions on uncharged lesser related offenses." (*People v. Hicks* (2017) 4 Cal.5th 203, 210 (*Hicks*), citing *People v. Birks* (1998) 19 Cal.4th 108, 112–113.) The *Hicks* court explained its reasoning in *Birks*:

> "We reasoned in *Birks* that granting a defense request for instructions on uncharged lesser related offenses would interfere with prosecutorial charging discretion, essentially allowing the defendant, not the prosecutor, to choose which charges are presented to the jury for decision, thus forcing the prosecution not only to prove the charged offenses but also to disprove any uncharged lesser related offenses that the defense might propose as an alternative. (*Birks*, *supra*, 19 Cal.4th at pp. 113, 129–130.) In other words, *Birks* makes clear that the goal of enabling a jury to return the most accurate verdict that the evidence supports does not require that every possible crime a defendant may have committed be presented to the jury as an alternative. Rather, a jury need only be instructed on offenses that the prosecution actually charged either explicitly or implicitly (because they were necessarily included within explicitly charged offenses)." (*Hicks*, *supra*, at p. 211.)

The California Supreme Court has also made clear that "there is no federal constitutional right of a defendant to compel the giving of lesser-related-offense instructions. [Citations.]" (*People v. Rundle* (2008) 43 Cal.4th 76, 148 (*Rundle*), citing *Birks* and *Hopkins v. Reeves* (1998) 524 U.S. 88, 96–97 (*Hopkins*).) The *Rundle* court expressly rejected the argument that a defendant is entitled to lesser related offense instructions as a component of his constitutional right to present a defense. (*Rundle*, *supra*, at p. 148 ["To the extent defendant challenges these holdings [i.e., *Birks* and

Hopkins)] by arguing there is a general federal constitutional due process right to present the 'theory of the defense case,' thus requiring that the instruction he requested on the [lesser related offense] . . . be given under the circumstances of this case, he merely has recast in different terms the same claims we already have rejected]".)

3. *Application*

Armijo's claim that the trial court erred in failing to instruct the jury on the lesser related offense of receiving stolen property is foreclosed by *Birks* and *Rundle.* (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["The decisions of this court are binding upon and must be followed by all the state courts of California"].)

We are not persuaded by Armijo's contention that we should conclude that the trial court erred in failing to provide a lesser related offense instruction in light of a 1994 decision from the United States Court of Appeals for the Eight Circuit, *United States v. Brown* (8th Cir. 1994) 33 F.3d 1002 (*Brown*).[2] In *Brown*, the Eighth Circuit concluded that a defendant charged with bank robbery was entitled to an instruction on being an accessory after the fact. (*Id.* at pp. 1003–1004.) In reaching this conclusion, the *Brown* court noted that, under the applicable federal statutes, "[t]he jury could not have found Brown guilty as the bank robber and as an accessory after the fact for the same bank robbery." (*Id.* at p. 1004.) According to the *Brown* court, given these statutes and the evidence in the case, "the accessory after the fact theory function[ed] as a defense" and

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2 We discuss the case at length since Armijo describes it as that which is "most strongly supportive of Armijo's position . . . ."

the defendant was entitled to an instruction in order to vindicate his right to present a defense. (*Ibid.*)

Brown does not support the giving of an instruction on the offense of receiving stolen property in this case, for several reasons. Most fundamentally, the *Brown* court's conclusion that the defendant was entitled to an accessory instruction in order to present his defense in that case was based on the fact that the defendant could *not* be convicted of both the bank robbery and being an accessory to the robbery. (*Brown*, *supra*, 33 F.3d at p. 1004.) However, a defendant *may* be convicted of both burglary and receiving stolen property. (See *People v. Allen* (1999) 21 Cal.4th 846, 866–867.) Receiving stolen property is thus not a *defense* to burglary, and the trial court's failure to instruct on receiving stolen property therefore did not violate Armijo's right to present a defense.

Further, the *Brown* court did not discuss the law governing instructions on lesser related offenses. Moreover, *Brown* was decided before *Hopkins*, in which the United States Supreme Court concluded that there is no federal constitutional right to an instruction on a lesser related offense. (*Hopkins, supra,* 524 U.S. at pp. 96–97.) Finally, the California Supreme Court in *Rundle* made clear that a defendant is not entitled to an instruction on a lesser related offense in order to vindicate the defendant's right to present a defense. (*Rundle, supra,* 43 Cal.4th at p. 148.)

Accordingly, we conclude that the trial court did not err in failing to instruct the jury on the lesser related offense of receiving stolen property.

B. *CALCRIM No. 371 is a proper instruction concerning a defendant's fabrication of evidence*

Armijo claims that the trial court erred in instructing the jury pursuant to a modified version of CALCRIM No. 371. He argues that the instruction is improper and violated his right to due process because it permitted the jury to draw the allegedly irrational inference that he was guilty based on his fabrication of evidence. He contends that the inference is irrational because a person may fabricate evidence for reasons unrelated to actual guilt.[3]

We review Armijo's claim of instructional error pursuant to the de novo standard of review. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

1. *Factual and procedural background*

As discussed in part II.C, *ante*, the People presented evidence at trial that Armijo made a recorded telephone call to Shirley from jail. During the call, while discussing how Shirley would testify at trial, Shirley told Armijo that she assumed that he had obtained the property that police recovered from her residence while going through trash cans. Armijo responded, "Ok, ok, just you don't remember nothing and that's the best answer and they can't force you to remember."

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3 We assume for purposes of this decision that Armijo may raise this contention notwithstanding the lack of any objection in the trial court, since Armijo's claim is that the instruction is improper in all applications as violative of a defendant's right to due process. (See, e.g, *People v. Hudson* (2006) 38 Cal.4th 1002, 1011–1012 [notwithstanding lack of objection in trial court, party may raise claim that court provided "an instruction that is an incorrect statement of the law"]; see also § 1259 ["[t]he appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"].)

The trial court instructed the jury pursuant to a modified version of CALCRIM No. 371 as follows:

> " 'If the defendant tried to create false evidence or obtain false testimony, that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such attempt cannot prove guilt by itself.' "

2. *Governing law*

In *People v. Jackson* (1996) 13 Cal.4th 1164 (*Jackson*), the California Supreme Court rejected a defendant's claim that instructing the jury pursuant to CALJIC 2.06, the predecessor of CALCRIM No. 371, violated a defendant's right to due process. (*Jackson*, *supra*, at p. 1224; see also *People v. Crandell* (1988) 46 Cal.3d 833, 871 [rejecting defendant's argument that instructing the jury pursuant to CALJIC No. 2.06 concerning the defendant's consciousness of guilt violated the defendant's due process rights].) The version of CALJIC No. 2.06 at issue in *Jackson* provided:

> " 'If you find that a defendant attempted to suppress evidence against himself in any manner, such as [by concealing evidence] such attempts may be considered by you as a circumstance tending to show a consciousness of guilt. However, such evidence is not sufficient in itself to prove guilt and its weight and significance, if any, are matters for your consideration.' " (*Jackson*, at p. 1223, fn. 13)

3. *Application*

The modified version of CALCRIM No. 371 pursuant to which the trial court instructed the jury in this case is not materially distinct from its predecessor, CALJIC No. 2.06, which was upheld in *Jackson, supra*, 13 Cal.4th at p. 1223.

We are not persuaded by Armijo's contention that the two instructions are materially different because CALCRIM No. 371 states that the jury may consider the defendant's conduct as a circumstance tending to " 'show that he was *aware* of his guilt,' " (italics added) while the CALJIC No. 2.06 instruction upheld in *Jackson* informed the jury that it could consider the defendant's conduct as a circumstance tending to "show a *consciousness* of guilt." (*Jackson*, *supra*, 13 Cal.4th at p. 1223, fn. 13, italics added.)

Armijo argues that "a jury instruction suggesting that the defendant is 'aware of his guilt,' is not equivalent to a more vague, impersonal suggestion of 'a consciousness of guilt.' " As Armijo acknowledges, the Court of Appeal in *People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1158 (*Hernandez Rios*) "held . . . the phrase 'aware of his guilt' is equivalent to 'a consciousness of guilt,' [and] reject[ed] the claim raised by Armijo here." In *Hernandez Rios*, the court noted that in *People v. Mendoza* (2000) 24 Cal.4th 130 (*Mendoza*), the California Supreme Court rejected a constitutional challenge to a " 'consciousness of guilt,' " (italics omitted) jury instruction premised on a defendant's flight. (*Hernandez Rios*, *supra*, at p. 1158.) The *Hernandez Rios* court concluded that a flight instruction that permitted a jury to infer, from a defendant's flight, that he was " 'aware of his guilt,' " (*ibid.*, quoting CALCRIM No. 372) was also constitutional, reasoning:

> "Our short etymological analysis of [defendant's] argument begins with a dictionary definition of the word 'aware': 'Having knowledge or cognizance.' (American Heritage Dict. (4th ed. 2000) p. 125.) In reliance on the dictionary's list of synonyms that include the word 'aware,' [defendant] argues that the word 'implies knowledge gained through one's own perceptions or by means of information.' (Italics omitted; see *ibid.*) 'Conscious,' another word on the list, 'emphasizes

> the recognition of something sensed or felt' (*id.*, at p. 125, italics omitted), which, of course, focuses on the acquisition of knowledge not by 'information' but by 'perceptions.' (*Ibid.*) Since the dictionary defines 'consciousness' as '[s]pecial awareness or sensitivity: class consciousness; race consciousness' (*id.* at p. 391, italics omitted), ipso facto the special awareness that *Mendoza* allows a jury to infer from a flight instruction is 'guilt consciousness' (in the syntax of the dictionary) or 'consciousness of guilt' (in the syntax of the California Supreme Court). (Compare American Heritage Dict., *supra*, at p. 391 (italics omitted) with *Mendoza*, *supra*, 24 Cal.4th at p. 180.) As the inference in *Mendoza* passes constitutional muster, so does the inference here." (*Hernandez Rios*, *supra*, at pp. 1158–1159.)

While Armijo "disagrees" with *Hernandez-Rios*, he offers no persuasive argument that its holding is incorrect.

Accordingly, we conclude that the trial court did not violate Armijo's right to due process by instructing the jury pursuant to a modified version of CALCRIM No. 371.

C. *The trial court did not abuse its discretion in denying Armijo's motion to strike one of his prior strikes*

Armijo claims that the trial court abused its discretion in denying his motion to strike one of his prior strikes.

1. *Factual and procedural background*

Prior to sentencing, Armijo filed a *Romero*[4] motion in which he requested that the trial court exercise its discretion under section 1385 to strike one of his prior strikes. In his motion, Armijo emphasized that he is a veteran and that most of his prior convictions are related to his drug addiction. Armijo also contended that he is not a violent felon and that no victims were present during his commission of any of his prior burglaries.

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4 *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

Armijo supported his motion with a Biopsychosocial Assessment drafted by a social worker that detailed the difficulties Armijo faced as a child, his struggles to live a productive life, and the relationship of his drug addiction to his criminal behavior. Armijo also attached an investigative report from his 2009 conviction for assault with force likely to produce great bodily injury (§ 245, subd. (a)(1)).[5] In the report, the victim of the offense stated that Armijo was attempting to help him and the victim did not recall Armijo hitting or kicking him. Armijo argued that he had pled guilty to the nonstrike offense of assault with force likely to produce great bodily injury (§ 245, subd. (a)(1)) in an attempt to avoid a potential life sentence.

The People filed an opposition to Armijo's *Romero* motion. In their opposition, the People highlighted Armijo's criminal record, noting that he had suffered numerous felony theft-related convictions and that he had served numerous terms in prison.

The trial court held a hearing on the motion. At the hearing, defense counsel reiterated the arguments made in the *Romero* motion, and the People submitted on their written opposition. The trial court denied the motion, ruling:

> "The written opposition gives us a clear indication of Mr. Armijo. Yeah, you're right. I guess it could have been worse. He could have had violence involved in this. The real difficulty is that he doesn't learn. How many times has he been sentenced to prison and he hasn't learned that you can't take other people's stuff, you know, break into people's houses and steal stuff. That's exactly what he did here.'

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5 Armijo argued that this was his only "conviction for involvement [with] a crime of violence."

> "I have no reason to believe, [Mr. defense counsel], that he's ever going to change, you know. So there is really a matter of protecting society from Mr. Armijo, keeping people's stuff in people's houses and not let Mr. Armijo steal from them. And that's really what the bottom line is. Your motion under Romero is denied."

2. *Governing law*

In deciding whether to dismiss a prior strike conviction allegation, the trial court "must consider whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, [he] may be deemed outside the [Three Strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*.)

A trial court's ruling on a motion to dismiss a prior strike conviction is entitled to deference and the party challenging such a ruling has the burden to "clearly show" that the ruling was irrational or arbitrary. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977–978.)

3. *Application*

Armijo's lengthy criminal record, which includes seven felony convictions, five prison terms, and numerous parole violations, supports the trial court's refusal to strike one of his prior strikes.[6] Armijo has continued to suffer theft-related convictions even after having been repeatedly imprisoned over a period of more than 25 years. In light of

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[6] In his *Romero* motion, Armijo acknowledged that he had "spent most of his adult life behind bars."

this record, the trial court could have reasonably determined that Armijo was a recidivist criminal whose record placed him squarely within the spirit of the Three Strikes law. (See *People v. Strong* (2001) 87 Cal.App.4th 328, 338 ["Following *Williams*, *supra*, 17 Cal.4th 148, the overwhelming majority of California appellate courts have reversed the dismissal of, or affirmed the refusal to dismiss, a strike of those defendants with a long and continuous criminal career"].)

On appeal, Armijo argues that his criminal record is not as serious as that of the defendant in *Williams*, and that his personal background and prospects compare favorably to the defendant in that case; that his strikes are remote and did not involve violence; and that the trial court could have imposed a significant prison sentence, even if it had exercised its discretion to strike one of his strikes. Even assuming that all of this is true, given Armijo's criminal record, we cannot say that the trial court abused its discretion in refusing to strike one of Armijo's strikes.

D. *Armijo forfeited his claim that the trial court's imposition of a sentence of 30 years to life constitutes cruel and unusual punishment; Armijo has not established that his counsel provided ineffective assistance in failing to raise this claim*

Armijo claims that his sentence constitutes cruel and unusual punishment. Armijo also contends that, to the extent we conclude that he has forfeited this claim, defense counsel provided ineffective assistance in failing to raise the claim.

1. *Armijo forfeited his claim that the trial court's imposition of a sentence of 30 years to life constitutes cruel and unusual punishment*

Armijo contends that the trial court's imposition of a sentence of 30 years to life in prison constitutes cruel and unusual punishment.

"A defendant's failure to contemporaneously object that his sentence constitutes cruel and unusual punishment forfeits the claim on appellate review." (*People v. Speight* (2014) 227 Cal.App.4th 1229, 1247.)

Armijo did not contend in the trial court that his sentence constitutes cruel and unusual punishment. We reject Armijo's argument, unsupported by authority, that he preserved his contention that his sentence constitutes cruel and unusual punishment by filing a *Romero* motion in the trial court seeking the dismissal of one of his two strikes. While there is undoubtedly some overlap between the facts relevant to both claims, the claims are distinct, and raising one is not sufficient to preserve the other. Accordingly, we conclude that Armijo has forfeited his claim that his sentence constitutes cruel and unusual punishment.

2. *Armijo has not established that his counsel provided ineffective assistance in failing to raise a claim of cruel and/or unusual punishment under the federal or state constitutions*

Armijo contends that his trial counsel rendered ineffective assistance in failing to raise the claim that the trial court's imposition of a sentence of 30 years to life in prison constitutes cruel and unusual punishment under the federal and state constitutions.

a. *The law governing ineffective assistance of counsel*

To establish ineffective assistance of counsel, a defendant must demonstrate both that counsel's performance was deficient and that it is reasonably probable that a more favorable result would have been reached absent the deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–688.) A reasonable probability is one that is "sufficient to undermine confidence in the outcome." (*Id.* at p. 694.) A court may reject

a claim of ineffective assistance of counsel if it finds either that counsel's performance was reasonable, or that the defendant has failed to demonstrate prejudice. (*Id.* at p. 687.)

b. *The federal constitution's prohibition against cruel and unusual punishment*

The Eighth Amendment of the federal Constitution (applicable to the states through the Fourteenth Amendment) prohibits the infliction of "cruel and unusual punishment."

"[I]t is now firmly established that '[t]he concept of proportionality is central to the Eighth Amendment,' and that '[e]mbodied in the Constitution's ban on cruel and unusual punishments is the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." [Citation.]' [Citations.]" (*In re Coley* (2012) 55 Cal.4th 524, 538.)

Under the United States Constitution "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime. [Citations.]" (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001 (conc. opn. of Kennedy, J.), citing *Solem v. Helm* (1983) 463 U.S. 277, 288.) Successful grossly disproportionate challenges are " 'exceedingly rare' " and appear only in an " 'extreme' " case. (*Lockyer v. Andrade* (2003) 538 U.S. 63, 73.)

In *Ewing v. California* (2003) 538 U.S. 11 (*Ewing*) (plur. opn. of O'Connor, J.), the United States Supreme Court held that lengthy indeterminate life sentences imposed

under California's Three Strikes law did not violate the Eighth Amendment.[7] In *Ewing*, the court considered whether a sentence of 25 years to life under California's Three Strikes law violated the Eighth Amendment. Ewing was convicted of grand theft for shoplifting three golf clubs valued at $1,200. He had previously been convicted of four serious felonies, including a robbery and three burglaries stemming from a single case, and his criminal record included numerous theft-related convictions, and convictions for drug possession, battery, burglary, unlawful possession of a firearm, and trespassing. (*Ewing*, *supra*, at pp. 17–18, 20.) The *Ewing* court concluded that Ewing's sentence did not violate the Eighth Amendment, reasoning that, "Ewing's sentence is justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record." (*Ewing*, at pp. 29–30.) The court noted that although Ewing's sentence was a long one, "it reflect[ed] a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated." (*Id.* at p. 30.)

c. *The state constitution's prohibition on cruel or unusual punishment*

The California Constitution states that "cruel or unusual punishment may not be inflicted . . . ." (Cal. Const., art. I., § 17.)

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7 Chief Justice Rehnquist and Justice Kennedy joined the plurality opinion, while Justices Scalia and Thomas filed opinions concurring in the judgment, concluding that the Eighth Amendment contains no proportionality principle at all. (*Ewing*, *supra*, 538 U.S. at pp. 31–32 (conc. opns. of Scalia, Thomas, Js.).)

In *People v. Gonzales* (2012) 54 Cal.4th 1234, 1300 (*Gonzales*), our Supreme Court summarized the manner by which a court is to evaluate an " 'as applied' " claim of cruel or unusual punishment under the state Constitution:

> " 'To determine whether a sentence is cruel or unusual under the California Constitution as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including his or her age, prior criminality, and mental capabilities. ([Citation].) If the penalty imposed is "grossly disproportionate to the defendant's individual culpability" ([citation]), so that the punishment " ' "shocks the conscience and offends fundamental notions of human dignity" ' " [citation], the court must invalidate the sentence as unconstitutional.' [Citation.]"

In determining whether a sentence violates the state constitution's guarantee against cruel or unusual punishment, courts may consider (1) the nature of the offense and the offender; (2) a comparison with the penalty for more serious crimes in the same jurisdiction; and (3) a comparison with punishment imposed for the same offense in different jurisdictions. (*In re Lynch* (1972) 8 Cal.3d 410, 425–427, fn. omitted.)

A "[d]efendant must overcome a 'considerable burden' to show the sentence is disproportionate to his level of culpability. [Citation.] Therefore, '[f]indings of disproportionality have occurred with exquisite rarity in the case law.' " (*People v. Em* (2009) 171 Cal.App.4th 964, 972.) Specifically, California courts have frequently rejected claims that indeterminate life sentences imposed under the Three Strikes law violate the state constitution's prohibition against cruel or unusual punishment. (See, e.g.,

People v. Meeks (2004) 123 Cal.App.4th 695, 710; *People v. Romero* (2002) 99 Cal.App.4th 1418, 1431–1432.)

d. *Armijo fails to demonstrate that it is reasonably probable that he would have obtained a more favorable result if defense counsel had raised the claim that Armijo's sentence violated the prohibition against cruel and unusual punishment in the federal constitution*

We consider first whether Armijo has demonstrated that it is reasonably probable that he would have obtained a more favorable result if defense counsel had raised a cruel and unusual punishment claim under the Eighth Amendment.

In presenting this argument, Armijo contends that his sentence of 30 years to life, which, he maintains, is the functional equivalent of a sentence of life without the possibility of parole given his age, is grossly disproportionate to his crimes because he has never committed a violent felony[8] and the majority of his offenses are property crimes driven by addiction. However, Armijo received this sentence after suffering seven prior felony convictions, including two strikes, and after serving five prior prison sentences. In light of this record, the United States Supreme Court's decision in *Ewing* makes clear that Armijo would not have prevailed on a claim that his sentence violates the Eighth Amendment. (*See Ewing*, *supra*, 538 U.S. at p. 25 ["When the California Legislature enacted the three strikes law, it made a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime. Nothing in the Eighth Amendment prohibits California from

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8 Although not a "violent" felony under the Three Strike law (§§ 667.5, subd. (c), 1192.7, subd. (c)), Armijo does have a conviction for assault with force likely to produce great bodily injury (§ 245, subd. (a)(1)).

making that choice"].) Indeed, the *Ewing* court specifically emphasized that it had upheld a life sentence, with the possibility of parole, in *Rummel v. Estelle* (1980) 445 U.S. 263 (*Rummel*) for a defendant whose criminal record was far less serious than Armijo's:

> "In *Rummel*, we held that it did not violate the Eighth Amendment for a State to sentence a three-time offender to life in prison with the possibility of parole. [Citation.] Like Ewing, Rummel was sentenced to a lengthy prison term under a recidivism statute. Rummel's two prior offenses were a 1964 felony for 'fraudulent use of a credit card to obtain $80 worth of goods or services,' and a 1969 felony conviction for 'passing a forged check in the amount of $28.36.' [Citation.] His triggering offense was a conviction for felony theft--'obtaining $120.75 by false pretenses.' [Citation.]" (*Ewing*, *supra*, 538 U.S. at p. 21.)

In sum, Armijo has not demonstrated a reasonable probability of a more favorable result had defense counsel raised a claim under the Eighth Amendment.

e. *Armijo fails to demonstrate that it is reasonably probable that he would have obtained a more favorable result if defense counsel had raised the claim that his sentence violated the prohibition against cruel or unusual punishment in the state constitution*

In considering Armijo's claim that it is reasonably probable that he would have obtained a more favorable result if defense counsel had raised a claim of cruel or unusual punishment under the state constitution, we begin by examining the circumstances of the offense. (*Gonzales*, *supra*, 54 Cal.4th at p. 1300.) Armijo's third strike was for the commission of a first degree residential burglary, a serious felony under the Three Strikes

law (§§ 667, subd (d), 1192.7, subd. (c)(18).)[9] Further, as the People rightly argue, Armijo's act in breaking into the victim's home and stealing her possessions likely inflicted emotional trauma as well as subjecting her to economic loss. While Armijo contends that his culpability for this offense is diminished because there is evidence that his commission of this offense, as well his criminal record in general, was motivated by a need to "finance his drug habit," the mitigating value of such evidence is greatly reduced by the fact that his many prior attempts to rehabilitate have been unsuccessful.

Armijo also contends that his "sentence for residential burglary," demonstrates that he "was punished more severely than defendants committing more serious crimes." Armijo was not sentenced for residential burglary. He was sentenced pursuant to an alternative sentencing scheme in the Three Strike law reserved for qualified recidivist offenders. (§ 1170.12, subds. (b)–(i).) We are not persuaded by Armijo's attempt to compare his sentence to the sentences that would be imposed under California law for serious or violent crimes in the *absence* of prior strikes. (See, e.g., *People v. Romero, supra,* 99 Cal.App.4th at p. 1433 [" ' "Because the Legislature may constitutionally enact statutes imposing more severe punishment for habitual criminals, it is illogical to compare [defendant's] punishment for his 'offense,' which includes his recidivist behavior, to the punishment of others who have committed more serious crimes, but have not qualified as repeat felons." [Citation.]' [Citation.]"].)

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9 Under a former version of the Three Strikes law, an individual with two or more prior strikes who is convicted of *any* new felony could receive an indeterminate life sentence. (See generally *People v. Yearwood* (2013) 213 Cal.App.4th 161, 167.)

Finally, we disagree that a comparison of Armijo's sentence with that which would be imposed for the same offense in other jurisdictions "compels the conclusion that the sentence here is cruel and unusual." The fact " '[t]hat California's punishment scheme is among the most extreme does not compel the conclusion that it is unconstitutionally cruel or unusual. This state constitutional consideration does not require California to march in lockstep with other states in fashioning a penal code. It does not require "conforming our Penal Code to the 'majority rule' or the least common denominator of penalties nationwide." [Citation.] Otherwise, California could never take the toughest stance against repeat offenders or any other type of criminal conduct.' " (*People v. Romero, supra,* 99 Cal.App.4th at p. 1433.)

Accordingly, we conclude that Armijo has not demonstrated a reasonable probability of a more favorable result had defense counsel raised a claim of cruel or unusual punishment under the state constitution.

E. *The trial court must recalculate Armijo's presentence conduct credits without applying the limitation contained in 2933.1*

Armijo claims that the trial court erred in applying section 2933.1 to limit his presentence conduct credits to just 15 percent of his actual time in custody, or 115 days.

Section 2933.1, subdivision (a) provides, "Notwithstanding any other law, any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of worktime credit, as defined in Section 2933."

Armijo contends that section 2933.1 does not apply in this case because he was not convicted of a felony offense specified in subdivision (c) of Section 667.5. Armijo

argues that the matter should be remanded with directions to recalculate his presentence conduct credits pursuant to section 4019,[10] without the limitation contained in section 2933.1.

The People concede the error and agree that a "remand is necessary for the trial court to recalculate [Armijo's] credits under section 4019."

We agree with the parties. Accordingly, we reverse the trial court's calculation of Armijo's presentence conduct credits, and remand the matter to the trial court with directions to recalculate Armijo's credits under section 4019, rather than 2933.1.

F. *The matter must be remanded to permit Armijo the opportunity to demonstrate that he is unable to pay the court operation and conviction assessments and/or restitution fines that the trial court imposed*

Citing *Dueñas*, *supra*, 30 CalApp.5th 1157, Armijo contends that the trial court erred in imposing a court operations assessment and criminal conviction assessment without first determining his ability to pay these charges. Armijo also maintains that this court should remand the matter with directions for the trial court to stay execution of the restitution fine unless the People establish his ability to pay this fine.

1. *Governing law*

a. *Relevant statutory law*

i. *Court operation and conviction assessments*

Section 1465.8 provides in relevant part:

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10 "Penal Code section 4019 provides that a person confined prior to sentencing may earn two days of conduct credit for every two days served." (*People v. McKenzie* (2018) 25 Cal.App.5th 1212.)

"(a)(1) To assist in funding court operations, an assessment of forty dollars ($40) shall be imposed on every conviction for a criminal offense . . . ."

Government Code section 70373 provides in relevant part:

"(a)(1) To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense . . . . The assessment shall be imposed in the amount of thirty dollars ($30) for each misdemeanor or felony . . . ."

ii. *Restitution fines*

Section 1202.4, provides in relevant part:

"(b) In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record.

"(1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense. If the person is convicted of a felony, the fine shall not be less than three hundred dollars ($300) and not more than ten thousand dollars ($10,000). If the person is convicted of a misdemeanor, the fine shall not be less than one hundred fifty dollars ($150) and not more than one thousand dollars ($1,000).

"(2) In setting a felony restitution fine, the court may determine the amount of the fine as the product of the minimum fine pursuant to paragraph (1) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted.

"(c) The court shall impose the restitution fine unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record. A defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine. Inability to pay may be considered only in increasing the amount of the restitution fine in excess of the minimum fine pursuant to paragraph (1) of subdivision (b). . . .

> "(d) In setting the amount of the fine pursuant to subdivision (b) in excess of the minimum fine pursuant to paragraph (1) of subdivision (b), the court shall consider any relevant factors, including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered losses as a result of the crime, and the number of victims involved in the crime. Those losses may include pecuniary losses to the victim or his or her dependents as well as intangible losses, such as psychological harm caused by the crime. Consideration of a defendant's inability to pay may include his or her future earning capacity. A defendant shall bear the burden of demonstrating his or her inability to pay. Express findings by the court as to the factors bearing on the amount of the fine shall not be required. A separate hearing for the fine shall not be required."

Section 1202.45, subdivision (a) provides, "In every case where a person is convicted of a crime and his or her sentence includes a period of parole, the court shall, at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4."

b. Dueñas

In *Dueñas*, 30 Cal.App.5th 1157, the Court of Appeal stated that "[i]mposing unpayable fines on indigent defendants is not only unfair, it serves no rational purpose, fails to further the legislative intent, and may be counterproductive." (*Dueñas*, *supra*, at p. 1167.) After noting that it was well established that "a state may not inflict punishment on indigent convicted criminal defendants solely on the basis of their poverty," (*id.* at p. 1166) and discussing the applicable principles of due process, the *Dueñas* court concluded that "the assessment provisions of Government Code section

70373 and . . . section 1465.8, if imposed without a determination that the defendant is able to pay, are thus fundamentally unfair . . . . " The *Dueñas* court further concluded that "imposing these assessments upon indigent defendants without a determination that they have the present ability to pay violates due process under both the United States Constitution and the California Constitution." (*Id.* at p. 1168.)

With respect to restitution fines imposed under section 1202.4, the *Dueñas* court noted that the California Supreme Court had previously concluded that such fines are punitive in nature. (*Dueñas, supra,* 30 Cal.App.5th at p. 1169, citing *People v. Hanson* (2000) 23 Cal.4th 355, 363.) The *Dueñas* court also noted that, while " '[t]he principle that a punitive award must be considered in light of the defendant's financial condition is ancient' " (*Dueñas, supra*, at p. 1170), section 1202.4, subdivision (c) *precludes* a trial court from considering a defendant's ability to pay the minimum restitution fine. (*Dueñas*, at p. 1170.) According to the *Dueñas* court, this results in a statutory scheme that "punishes indigent defendants in a way that it does not punish wealthy defendants." (*Ibid.*)

Although the *Dueñas* court based its reasoning on a "due process inquiry" (*Dueñas, supra*, 30 Cal.App.5th at p. 1171), the court also stated that it must "interpret statutes to avoid serious constitutional questions when such interpretations are fairly possible." (*Id.* at p. 1172.) Accordingly, the *Dueñas* court held that "although the trial court is required by Penal Code section 1202.4 to impose a restitution fine, the court must stay the execution of the fine until and unless the People demonstrate that the defendant has the ability to pay the fine." (*Duenas, supra*, at p. 1172.)

2. *Factual and procedural background*

Prior to Armijo's sentencing, the probation officer filed a probation report recommending that the trial court impose "a total CCO fee [(court construction and operations fee)] of $70.00 (*per conviction*) consisting of a $30.00 Court Construction Fee pursuant to Government Code Section 70373[, subdivision] (a)(1) and a $40.00 Court Operations Fee pursuant to . . . Section 1465.8[, subdivision] (a)(1) . . . ." The probation officer also recommended that the trial court impose a restitution fine pursuant to section 1202.4 in the amount of $10,000 and a corresponding parole revocation restitution fine pursuant to section 1202.45 fine in the amount of $10,000.[11]

At sentencing, the trial court found that Armijo did not have the ability to "reimburse the county for attorney's fees,"[12] and did not "have the present ability to pay the costs of conducting the presentence recommendations and preparing a report." Immediately thereafter, the trial court stated, "I will order a $70 . . . CCO fee . . . ."[13]

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11 The report in the record contains the number $10,000 in typewritten font with respect to each fine. The $10,000s are crossed out, and the number $1,000 is handwritten above each number. Although it is not entirely clear from the record, it appears that the trial court likely crossed out the typewritten $10,000s and wrote $1,000 above each number.

In accordance with section 1202.45, the report recommended that the parole revocation restitution fine be stayed pending Armijo's successful completion of parole.

12 Armijo was represented by a public defender throughout the trial court proceedings.

13 We interpret this statement as the parties do, to mean that the trial court imposed a $40 court operations assessment (§ 1465.8) and a $30 criminal conviction assessment (Gov. Code, § 70373).

Also at sentencing, defense counsel stated, "I would ask . . . the restitution fine be set at the minimum which is $300, your Honor."

After the People submitted on the issue, the trial court stated, "The restitution fine pursuant to . . . section 1202.4 in the amount of $1,000 is ordered to be collected by the Department of Corrections." The trial court also imposed a corresponding $1,000 parole revocation restitution fine pursuant to section 1202.45, but stayed execution of that fine pending Armijo's successful completion of parole.

3. *Application*

The People argue that Armijo forfeited his contention that the trial court erred in imposing the assessments and fines by failing to raise the issue in the trial court. In light of the fact that *Dueñas* had not been decided at the time of Armijo's sentencing, and in order to forestall a claim of ineffective assistance of counsel, we exercise our discretion to consider Armijo's claim on the merits, notwithstanding any possible forfeiture.[14] (See *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 414 [treating claim as preserved in light of case law decided after defendants' trial]; *People v. Lewis* (1990) 50 Cal.3d 262, 282 [considering claim on merits in order to forestall ineffective assistance

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14 Armijo contends in the alternative that, should this court conclude that his challenges to the assessments and/or restitution fine are forfeited, trial counsel provided ineffective assistance of counsel. We need not consider this contention in light of our consideration of Armijo's challenges to these charges on the merits.

claim]); *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 [stating that an appellate court generally has discretion to consider unpreserved claims].)[15]

On the merits, we agree with *Dueñas* that principles of due process preclude a trial court from imposing court operation and criminal conviction assessments and restitution fines that the defendant is unable to pay. (See *Dueñas, supra,* 30 Cal.App.5th at p. 1168.)[16] However, we agree with the People that, as was made clear in *People v. Castellano* (2019) 33 Cal.App.5th 485 (*Castellano*), a trial court is required to determine a defendant's ability to pay such charges only if the defendant raises the issue, and that the defendant bears the burden of proving an inability to pay. (*Id*. at p. 490 ["Consistent with *Dueñas*, a defendant must in the first instance contest in the trial court his or her

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15 Courts have adopted a variety of approaches to forfeiture in this context, which this court summarized in *People v. Gutierrez* (June 4, 2019, D073103) ___Cal.App.5th ___ [2019 Cal.App. Lexis 513]. However, we need not address that case law in this opinion since we exercise our discretion to consider Armijo's claim, notwithstanding any possible forfeiture.

16 With respect to a restitution fine imposed under section 1202.4, subdivision (b), we agree with the *Dueñas* court's suggestion that section 1202.4 violates due process to the extent that it requires a trial court to impose a restitution fine without permitting the defendant to demonstrate an inability to pay. However, we disagree with *Dueñas* to the extent that it can be read as holding that, as matter of *statutory interpretation*, section 1202.4 requires that a court impose the restitution fine and stay the execution of that fine upon a showing that the defendant is unable to pay the fine. While the cannon of constitutional avoidance is laudatory, it applies only when the statute is "*realistically* susceptible of two interpretations," one of which avoids the serious constitutional question. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1146.) The *Dueñas* court offered no analysis in support of its holding that it is "fairly possible," (*Dueñas, supra,* 30 Cal.App.5th at p. 1172) to *interpret* section 1202.4, subdivision (b) as operating in such a fashion. Rather, in our view, for the reasons that the *Dueñas* court persuasively outlines, *constitutional* principles of due process preclude a trial court from imposing a restitution fine under section 1202.4, subdivision (b) in those cases in which a defendant demonstrates an inability to pay the fine.

ability to pay the fines, fees and assessments to be imposed and at a hearing present evidence of his or her inability to pay the amounts contemplated by the trial court"]; cf. *People v. McMahan* (1992) 3 Cal.App.4th 740, 749 [concluding that defendant must raise issue of inability to pay fine imposed under section 290.3 and observing that "the most knowledgeable person regarding the defendant's ability to pay would be the defendant himself," and that "[i]t should be incumbent upon the defendant to affirmatively argue against application of the fine and demonstrate why it should not be imposed"].)[17]

The parties disagree regarding Armijo's ability to pay the criminal operations and conviction assessments and restitution fines.[18] Armijo should be given the opportunity to demonstrate his inability to pay these charges in the trial court.[19] If Armijo avails himself of this opportunity, in determining whether he is able to pay such charges, the trial court may consider Armijo's lengthy prison sentence and his potential earnings while incarcerated. (See, e.g., *Castellano*, *supra*, 33 Cal.App.5th at p. 490; accord *People v.*

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17 This result is consistent with section 1202.4, subdivision (d) which provides that a court may consider the defendant's inability to pay in setting a fine above the minimum amount, but that "[a] defendant shall bear the burden of demonstrating his or her inability to pay." (§ 1202.4, subd. (d).)

18 Although not separately addressed by Armijo, our conclusion that the restitution fine imposed under section 1202.4, subdivision (b) must be reversed in order to permit Armijo to attempt to demonstrate that he is unable to pay this fine, also requires that we reverse the $1,000 corresponding parole revocation fine that the trial court imposed under section 1202.45, subdivision (a). (See § 1202.45, subd. (a) ["the court shall, at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation restitution fine *in the same amount* as that imposed pursuant to subdivision (b) of Section 1202.4" (italics added)].)

19 The trial court may exercise its discretion in determining the manner by which Armijo may attempt to make such showing on remand.

Frye (1994) 21 Cal.App.4th 1483, 1487 [stating that a defendant's restitution fine may be paid out of prison wages]; § 2085.5 [outlining the manner by which a restitution fine balance may be collected from prison wages].) If Armijo fails to demonstrate an inability to pay the assessments and/or restitution fines, the trial court may reimpose the charges.

IV.

DISPOSITION

The trial court's determination of Armijo's presentence conduct credit is reversed. The trial court's imposition of the $40 court operations assessment, $30 criminal conviction assessment, $1,000 restitution fine, and $1,000 parole revocation restitution fine are reversed. The matter is remanded for the trial court to recalculate presentence conduct credit under section 4019, rather than section 2933.1 and to permit Armijo to attempt to demonstrate that he lacks the ability to pay the court operations assessment, criminal conviction assessment, and/or restitution fines. In all other respects, the judgment is affirmed.

AARON, J.

I CONCUR:

GUERRERO, J.

HUFFMAN, Acting P.J., Concurring and Dissenting.

I respectfully dissent from that portion of the opinion in which the majority concludes this matter should be remanded to the superior court, under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), to allow Carlos Daniel Armijo to demonstrate he lacks the ability to pay the $40 court operations assessment (Pen. Code,[1] § 1465.8), the $30 criminal conviction assessment (Govt. Code, § 70373), the $1,000 restitution fine under section 1202.4, subdivision (b), and the $1,000 parole revocation restitution fine.[2] Instead, because Armijo did not object below to these assessments and fines, I would follow *People v. Frandsen* (2019) 33 Cal.App.5th 1126, and conclude, for the reasons set forth in that case, that Armijo forfeited any claim of error concerning the superior court's failure to determine his ability to pay the assessments and restitution fines. (See *id.* at pp. 1153-1154.)

Yet, I acknowledge that it is well within this court's discretion to review a forfeited claim. (See *People v. McCullough* (2013) 56 Cal.4th 589, 593; *In re Sheena K.* (2007) 40 Cal.4th 875, 887, fn. 7.) That said, I would not have this court exercise such discretion here. Further, perhaps more importantly, I would not use the instant action as a vehicle to follow *Dueñas, supra*, 30 Cal.App.5th 1157. *Dueñas* consists of extreme facts, on which the appellate court proclaimed a significant constitutional principle, namely, a trial court must hold a hearing to determine a defendant's present ability to pay before

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1 Statutory references are to the Penal Code unless otherwise specified.

2 The trial court stayed the parole revocation restitution fine.

imposing *any* assessment or fine. (*Id.* at p. 1164.) I would not apply that principle here. Yet, despite my belief that this is not the case to weigh in broadly and endorse the rule espoused in *Dueñas*, nevertheless, I feel compelled to discuss *Dueñas* because the majority has followed that case to some extent.

In *Dueñas*, the defendant, an indigent, homeless mother of two, subsisted on public aid while suffering from cerebral palsy. (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1160-1161.) As a teenager, the defendant's license was suspended when she could not pay some citations. (*Id.* at p. 1161.) She then was convicted of a series of misdemeanor offenses for driving with a suspended license, and in each case, she was given the Hobson's choice to pay mandatory fees and fines, which she lacked the means to do, or go to jail. (*Id.* at p. 1161.) She served jail time in the first three of these cases, but still faced outstanding debt, which increased with each conviction. (*Ibid.*)

After her fourth conviction of driving with a suspended license, the defendant was placed on probation and again ordered to pay mandatory fees and fines. (*Dueñas, supra,* 30 Cal.App.5th at pp. 1161-1162.) To try to stop the cycle of ever enhancing fees and fines, the defendant brought a due process challenge to section 1465.8, Government Code section 70373, and section 1202.4, the statutes under which the fees and fines were imposed (the same statutes at issue here). (*Dueñas*, at p. 1164.) She argued that "[t]hese statutes . . . are fundamentally unfair because they use the criminal law, which is centrally concerned with identifying and punishing only blameworthy decisions, to punish the blameless failure to pay by a person who cannot pay because of her poverty. The laws, moreover, are irrational: They raise no money because people who cannot pay do not

pay." (*Ibid*.) The appellate court agreed, determining that due process "requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments under Penal Code section 1465.8 and Government Code section 70373." (*Dueñas*, at p. 1164.) The court also concluded that "although Penal Code section 1202.4 bars consideration of a defendant's ability to pay unless the judge is considering increasing the fee over the statutory minimum, the execution of any restitution fine imposed under this statute must be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine." (*Dueñas*, at p. 1164.)

Here, except for being ordered to pay mandatory fees and fines under the same statutes, Armijo is nothing like the defendant in *Dueñas*. He is a 51-year-old man, with a high school education, who served in the Army and is trained as a carpenter. He was employed by a trucking company until he was arrested. Armijo is not an indigent mother of two, living off public assistance. In addition, unlike the defendant in *Dueñas*, Armijo's legal troubles did not begin with a suspended license caused by an inability to pay certain citations. To the contrary, Armijo has an extensive criminal record that led to his lengthy sentence under the Three Strikes law. In short, Armijo is not caught in an endless cycle of fines and misdemeanor violations, creating an insurmountable mountain of debt, over which he cannot ascend.

Not only are Armijo's background and criminal history vastly different than the defendant's in *Dueñas*, his lengthy prison sentence provides Armijo with an additional avenue from which to earn wages over a sustained period to pay his assessment and fines.

(See *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837 [ability to pay includes a defendant's ability to obtain prison wages].) Prisoners earn wages ranging from $12 per month (for the lowest skilled jobs) to $72 per month (for the highest). (Cal. Dept. of Corrections & Rehabilitation, Operations Manual, §§ 51120.6, 51121.10 (2019).) And prison wages can be deducted to pay a restitution fine. (See § 2085.5 [outlining how a restitution fine balance may be collected from prison wages].) The fines imposed on Armijo total $1,070. His sentence is 30 years to life. Assuming he serves 80 percent of the sentence and earns the minimum monthly wage, his prison wages will be more than sufficient to pay his fine and assessment. For this reason as well, I believe remand is not warranted under *Dueñas*, *supra*, 30 Cal.App.5th 1157.

In addition, not only would I not remand the instant matter for an affordability determination under *Dueñas*, *supra*, 30 Cal.App.5th 1157, I would not follow *Dueñas* under the record before me. In my opinion, *Dueñas* raises significant questions that it does not answer. For example, it is not clear what the trial court may consider in determining a defendant's ability to pay. The court in *Dueñas* explained:

> "We conclude that due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments under Penal Code section 1465.8 and Government Code section 70373. We also hold that although Penal Code section 1202.4 bars consideration of a defendant's ability to pay unless the judge is considering increasing the fee over the statutory minimum, the execution of any restitution fine imposed under this statute must be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine." (*Dueñas*, at p. 1164.)

Thus, the court appears to suggest that the trial court must consider the defendant's ability at the time of the hearing only to determine if he or she has the means to pay the assessments and/or fines. This borders on nonsensical. I struggle to contemplate any but the rare defendant, who at the time of sentencing, would have the means to pay an assessment or fine. This is especially true if the defendant has been incarcerated before the trial and has not had the opportunity to earn an income.

Further, the *Dueñas* court's approach frustrates the Legislature's command evidenced by the plain language of the statutes at issue. Neither section 1465.8 nor Government Code section 70373 provide a court any discretion in imposing an assessment under those statutes. Instead, both statutes mandate the court to levy the assessments. (§ 1465.8, subd. (a); Govt. Code, § 70373.) Similarly, under section 1202.4, a court does not have discretion to avoid imposing the minimum restitution fine, absent "compelling and extraordinary reasons for not doing so" (§ 1202.4, subd. (b)), but may consider a defendant's ability to pay when increasing the fine above the minimum amount.[3] (§ 1202.4, subd. (c).) *Dueñas* essentially rewrites these statutes to provide the court with discretion where the Legislature did not grant the courts any such discretion.

Additionally, the *Dueñas* court's decree that a trial court must hold a hearing on a defendant's *present* ability to pay renders superfluous section 2085.5. That section allows the Department of Corrections and Rehabilitation (DCR) to garnish a portion of a defendant's prison wages to pay certain fines. (See § 2085.5.) Yet, there would be no

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3 "A defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine." (§ 1202.4, subd. (c).)

need for the DCR to ever garnish a prisoner's wages if a court could only impose a fine that a defendant had the ability to pay at the time of sentencing.[4] Thus, *Dueñas* leaves no need for the DCR to garner a prisoner's wages.

Finally, *Dueñas* leaves open the question of what harm must be shown to find a due process violation. In *Dueñas*, the defendant's poverty and family situation made clear the harm of having the fines imposed. Indeed, it was the imposition of the fines and her inability to pay that led to her cycle of debt and imprisonment. In other words, the defendant's harm in *Dueñas* extended beyond her inability to pay, warranting the court's finding of a due process violation. (See *Dueñas*, *supra*, 30 Cal.App.5th at pp. 1168-1169.) However, in *People v. Castellano* (2019) 33 Cal.App.5th 485 (*Castellano*), the court held: "Consistent with *Dueñas*, a defendant must in the first instance contest in the trial court his or her ability to pay the fines, fees and assessments to be imposed and at a hearing present evidence of his or her inability to pay the amounts contemplated by the trial court. In doing so, the defendant need not present evidence of potential adverse consequences beyond the fee or assessment itself, as the imposition of a fine on a defendant unable to pay it is sufficient detriment to trigger due process protections." (*Castellano*, at p. 490.)

Thus, under *Castellano*, *supra*, 33 Cal.App.5th 485 and *Dueñas*, *supra*, 30 Cal.App.5th 1157, a court violates due process if it imposes an assessment and/or fine

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4 I note the majority does not conclude that a trial court must only consider Armijo's present ability to pay, but can consider the wages he will earn during his lengthy prison sentence.

that a defendant cannot, at the time of sentencing, afford even without the defendant showing any potential adverse consequences that may arise from the assessments and/or fines. Applying this principle to the instant matter, I fail to see any adverse consequences to Armijo if the trial court determined that he did not have the present ability to pay $1,070 in assessments and fines. He will be serving a lengthy prison sentence (30 years to life) that he argues in his opening brief is all but a life sentence. Further, a portion of his fine (if not all of it) can be paid off through garnishment of his prison wages. (§ 2085.5.) Under these circumstances, it is not clear to me how Armijo's due process rights could be violated by the imposition of the subject assessments and fines.

Dueñas, *supra*, 30 Cal.App.5th 1157 raises serious questions that the Legislature must address. However, under acute facts like the ones facing the appellate court in *Dueñas*, I am not troubled by a court finding a due process violation initially caused by a defendant's inability to pay certain fees and/or fines and the adverse consequences she suffered. That is not the case before this court.

For these reasons, I dissent from that portion of the majority opinion wherein this matter is remanded to the trial court for an ability to pay hearing. In other respects, I concur in the judgment.

HUFFMAN, Acting P. J.